Supreme Court, U.S.
FILED
04171 5 APR-1 8 2005
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ANICETA TAMAYO, MICHAEL SALIM, and CHRISTIAN SALIM,

Petitioners

V.

JOHN ASHCROFT, UNITED STATES ATTORNEY GENERAL

Respondent

On Petition For Writ Of Certiorari
To the Decision of the United States Court of Appeals
for the Ninth Circuit

Jack P. Holmes, Esq.
2400 E. Katella Avenue,
Suite 725
Anaheim, California 92806
(714) 634-8801

QUESTIONS PRESENTED

1. Did the trial Judge abuse his discretion in denying Petitioner's claim for political asylum?

2. Did the Board of Immigration Appeals fail to properly review the underlying appeal and issue a boilerplate decision?

3. Was Petitioner denied a full and fair hearing because the trial Judge did not act in a neutral fashion?

4. Should the Court of Appeals have remanded the matter for re-trial?

PARTIES TO THE PROCEEDING

Petitioners are Aniceta Tamayo, Michael Salim, and Christian Salim. They are respondents in the United States Office for Immigration Review (Immigration Court) and appellants in the Court of Appeals. They bring this action on their own behalf.

Respondent is the United States Attorney General, named in the underlying proceedings as John Ashcroft, now Alberto Gonzalez due to the change of the Attorney General.

TABLE OF CONTENTS

Page

Questions presented i

Parties to the proceeding..... ii

Table of Contents..... iii

Table of authorities..... iv

Petition for writ of certiorari..... 1

Opinions below 1

Jurisdiction..... 1

Statement of the Case 1

Proceedings below..... 6

Reasons for granting the writ 7

1. Due process 7

2. The BIA failed to provide an individualized ruling..... 8

3. Petitioner was qualified for asylum and the court abused it's discretion..... 9

Conclusion..... 13

TABLE OF AUTHORITIES

Page

CASES:

Andriasian v. INS (9th Cir., 1999) 180 F.3d 1033, 1043-47..... 1

Clomenar v. INS (9th Cir., 2000) 210 F.3d 967, 971..... 7

Reyes-Melendez v. INS 9th Cir., Sept. 4, 2003) 02-70526, 2003 WL..... 8

Ghaly v. INS (9th Cir., 1995) 58 F. 3d 1425, 1430 9

Castillo v. INS (9th Cir., 1991) 951 F.2d 1117 9

Kataria v. INS (9th Cir. 2000) 232 F.3d 1107 10

Matter of Villalta (BIA 1990) 20 I&N 142, 3126 10

McMullen v. INS (9th Cir., 1981) 658 F.2d 1312..... 11

Llana Castellon v. INS 10th Cir., 1994) 16 F.3d 1093..... 11

Matter of S-A (Interim Decision No. 3433, BIA 2000) 21 I&N Dec..... 11

Matter of Acosta (BIA 1985) 19 I&N Dec. 211 11

Matter of Mogharrabi (BIA 1987) 19 I&N Dec. 439 11

Guevara-Flores v. INS (5th Cir., 1986) 786 F.2d 1242..... 11

STATUTES:

28 U.S.C. 1254(1)..... 1

8 U.S.C. 1158 (a)(3)..... 2

I.N.A. 101(a)(42)(A)..... 9

8 U.S.C. 1101(a)(42)(A)..... 9

I.N.A. 208(b)(1)..... 9

8 U.S.C. 1158 (b)(1)(Supp.II 1996)... 9

PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The January 18, 2005 Judgment of the United States Court of Appeals denying Petitioner's Appeal appears in the appendix hereto, App. 1.

BASIS FOR JURISDICTION IN THIS COURT

This court has jurisdiction to review this matter under Andriasian v. INS, 180 F.3d 1033, 1043-47 (9th Cir, 1999) which held that the Attorney General's ultimate decision to grant or deny asylum to an eligible applicant is reviewed for abuse of discretion. This Court additionally has jurisdiction to review the Ninth Circuit's Judgment pursuant to 28 U.S.C. § 1254(1).

1

STATEMENT OF THE CASE

Petitioner initially applied for asylum by submitting a form I-589 to her regional asylum office more than one year after entry to the United States. Petitioner was required, under 8 U.S.C.1158(a)(3), to file that application within one year of entry unless changed circumstances could be demonstrated which justified the late filing. Petitioner was interviewed and received a decision. The asylum officer found that Petitioner had established changed or extraordinary circumstances in support of her asylum application. However, the asylum officer believed that Petitioner has not filed her asylum application within a reasonable time of those extraordinary circumstances.

The asylum officer could not have found changed or extraordinary circumstances unless grounds existed for the grant of asylum. If grounds for asylum did not exist, Petitioner's circumstances would

not have been relevant to the decision of the asylum officer. At that stage of the case the sole issue was whether the delay in filing the asylum application was indeed reasonable.

Petitioner was served with a Notice to Appear and, at the initial Master Immigration Court Hearing, the court was informed that a new asylum application would be filed because the initial application was not prepared by an attorney. Petitioner's counsel filed the new application with factual contentions that Petitioner's husband, upon his return to Indonesia, was beaten because he is ethnic Chinese and a Christian. Petitioner provided years worth of news media documentary evidence on the conditions in Indonesia and the failure and/or collusion of the Indonesian government to protect ethnic Chinese Christians from being beaten, injured and murdered by roving bands of Muslim militant groups that the government either could not, or would

not, control.

At one point the media reported that substantial changes were occurring in the political polices of the Indonesian government and the Juharto regime was being ousted. Due to these apparent changed circumstances Petitioner waited to file her political asylum application. It was not until much later that it became apparent, through media reports, that the conditions were actually worsening. Christian churches in Petitioners town were being fire bombed, Muslim paramilitary troops were murdering ethnic Chinese Christians in the streets with impunity, and the government was apparently providing arms to the Muslim troops. These conditions were country wide and were documented in the media articles attached to Petitioner's application. The State Department reports produced at trial also supported these claims.

However, the trial judge refused to take any of these facts into account. Petitioner contends that the trial judge was flippant and mocking the Petitioner and her counsel. The judge continually interrupted petitioner's counsel, asked his own questions, and then queried do you have anything else (sic); in other words aren't you done yet? The judge asked several times, do you have anything else because I want you to be able to present anything you want (sic), again, in other words are you done yet? Trial counsel was not allowed to present the case in a flowing cohesive manner.

The main basis of the judge's decision was that Petitioner's husband was allowed to return to the United States after he was beaten by troops, and that the beating was due to his involvement in a bank formerly owned by a high government official; and that the evidence only showed generalized country conditions. However, there was no evidence that the beating was due to